

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

FILE

Office: San Francisco

Date:

IN RE: Applicant:

JUL 03 2003

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under
Section 212(a)(9)(B)(v) of the Immigration and Nationality Act,
8 U.S.C. § 1182(b)(9)(B)(v)

ON BEHALF OF APPLICANT:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is before the AAO on a motion to reopen. The motion will be granted. The order dismissing the appeal will be withdrawn, and the application will be approved.

The applicant is a native and citizen of France who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than 180 days but less than 1 year. The applicant was admitted to the United States on September 1, 1997, as a nonimmigrant visitor with authorization to remain until December 1, 1997. She remained longer than authorized without applying for or obtaining an extension of temporary stay. She married a U.S. citizen on October 11, 1999, while being unlawfully present. She is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The district director determined that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. The AAO affirmed that decision on appeal.

On appeal, counsel discussed the applicant's spouse's (hereafter referred to as [REDACTED]) lifelong problems with alcoholism, depression and addiction. Counsel suggested that the applicant's love and support would enable [REDACTED] to overcome those problems. Documentation in the record at that time indicated that [REDACTED] had been receiving psychotherapy since 1975 when he was 10 years old. Other documentation indicated that [REDACTED] successfully completed a long-term drug treatment program and found employment in 1993. This occurred prior to meeting the applicant in 1998.

On motion, counsel states that [REDACTED] has remained tortured by his life-long battle with alcoholism and addiction. Counsel states that his rehabilitation programs have proven to be only marginally successful leaving him addicted and at times even suicidal. Counsel provides evidence that [REDACTED] mother died in June 2002 at the age of 72. Counsel provides a recent evaluation of [REDACTED] by a clinical psychologist that indicates [REDACTED] has slipped into a greater state of depression and the grief has increased his suicidal tendencies.

Section 212(a)(9)(B) of the Act provides, in pertinent part, that:

(i) Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States, whether or not pursuant to

section 244(e), prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal,...is inadmissible.

(v) The Attorney General [now Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). After reviewing the IIRIRA amendments to the Act relating to fraud, misrepresentation and unlawful presence in the United States, and after noting the increased penalties Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar in some instances, eliminating children as a consideration in determining the presence of extreme hardship, and providing a ground of inadmissibility for unlawful presence (entry without inspection) after April 1, 1997, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud, misrepresentation and unlawful presence of aliens in the United States.

The Board of Immigration Appeals (the Board) has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996).

The Board noted in *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) that the alien's wife knew that he was in deportation proceedings at the time they were married. The Board stated that this factor goes to the wife's expectations at the time that they were wed. The alien's wife was aware that she may have to face the decision of parting from her husband or following him to Mexico in the event he was ordered deported. The alien's wife was also aware that a move to Mexico would separate her from her family in the United States. The Board found this to undermine the alien's argument that his wife will suffer extreme hardship if he is deported. The Board then refers to *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), where the court stated that "extreme hardship" is

hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship.

Counsel has submitted additional documentation that indicates Matthew is facing additional emotional challenges that would endanger his capacity to recover from his life-long psychological and emotional problems and recovery from substance abuse. It is concluded that the removal of the applicant, even for three years, in addition to the recent loss of his mother, could lead to Matthew having a serious relapse or worse.

After reviewing the documentation in the record in its totality, and including the new evidence presented on motion, it is concluded that the record now establishes the existence of hardship to Matthew (the only qualifying relative) caused by separation that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to return to the United States.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Secretary and pursuant to such terms, conditions, and procedures as he may by regulations prescribe.

The favorable factor in this matter include the extreme hardship to the qualifying relative, and the absence of a criminal record or other immigration violation. The unfavorable factors are the applicant's overstay and period of unlawful presence. Though her actions cannot be condoned, the applicant has now demonstrated the favorable factors outweigh the unfavorable ones in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the motion will be granted. The order dismissing the appeal will be withdrawn, and the application will be approved.

ORDER: The motion is granted. The order of July 18, 2002 dismissing the appeal is withdrawn, and the application is approved.